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7 SHOP ON STAGE, INC. and
CHRISTIAN AUDIGIER, an Individual
8
9

10 UNITED STATES DISTRICT COURT
11 CENTRAL DISTRICT OF CALIFORNIA
12

13 BUCKLEY H. CRISPIN, an
Individual,

14 Plaintiffs,

15 v.

16 CHRISTIAN AUDIGIER, INC., a
California Corporation; NERVOUS
17 TATTOO, INC., a California
Corporation; SHOP ON STAGE,
18 INC., a California Corporation;
CHRISTIAN AUDIGIER, an
19 Individual; 3A WATCH, LLC, a
California Limited Liability
20 Company; RADIANCE JEWELRY,
21 INC., a California Corporation;
CHROMEBONES, a business entity
22 of unknown form, REVOLUTION
EYEWEAR, INC., a California
23 Corporation and DOES 1-10,
inclusive,

24 Defendants.
25
26
27
28

Case No. CV09-9509 MMM (JEMx)

Assigned to Hon. Margaret M. Morrow

**NOTICE OF MOTION AND
MOTION TO DISMISS
COMPLAINT FOR (1) LACK OF
SUBJECT MATTER JURISDICTION
[FRCP 12(B)(1)]; (2) FAILURE TO
STATE A CLAIM ON WHICH
RELIEF CAN BE GRANTED [FRCP
12(B)(6)]; AND (3) INSUFFICIENT
PROCESS AND SERVICE OF
PROCESS [FRCP 12(B)(4) AND (5)]**

Date: March 29, 2010
Time: 10:00 a.m.
Cttrm: 780, Roybal Building

Complaint Filed: December 29, 2009

NOTICE OF MOTION

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on March 29, 2010 at 10:00 a.m., or as soon thereafter as the matter may be heard before the Honorable Margaret M. Morrow in Courtroom 780 of the United States District Court for the Central District of California, Western Division, located at 255 East Temple Street, Los Angeles, California 90012, Defendants Christian Audigier, Inc., Nervous Tattoo, Inc., Shop on Stage, Inc. and Christian Audigier (collectively, the “Defendants”) will and hereby do move for an order dismissing the Complaint, and each of the claims therein, filed by Plaintiff Buckley H. Crispin (“Plaintiff”) on or about December 29, 2009 (the “Complaint”).

The motion will be made pursuant to Rules 12(b)(1), 12(b)(4), 12(b)(5), and 12(b)(6) of the Federal Rule of Civil Procedure, on the grounds that (1) Plaintiff fails to state a claim on which relief can be granted for his copyright infringement and breach of implied covenant of good faith and fair dealing claims, (2) Plaintiff has not alleged that his copyrights are registered with the Copyright Office as required for this court to have subject matter jurisdiction over Plaintiff’s copyright infringement claim; (3) Plaintiff’s service of summons in the action summons is defective, and a copy was not provided to each Defendant at service, (4) Plaintiff did not properly serve Christian Audigier, an individual, under the Federal Rules of Civil Procedure or California law, and (5) without federal question jurisdiction over Plaintiff’s copyright claim, this Court lacks subject matter jurisdiction over this action.

This motion is based upon this Notice of Motion and Motion, the accompanying Memorandum of Points and Authorities, the Declarations of Michael Bowse, Alina Landver, and Walter Barbieri filed concurrently herewith, the files of

1 this action, and all other matters properly presented to the Court prior to or at the
2 hearing on this motion.

3 This motion is made after conference by the parties required by Local Rule
4 7.3 conducted by letters dated December 18, 2009 and December 28, 2009, which
5 addressed Plaintiff's draft complaint identical to the one filed on December 29,
6 2009.

7
8 Dated: January 26, 2010

BROWNE WOODS GEORGE LLP
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Amanda Morgan

9
10
11 By: /s/ Michael A. Bowse
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14 SHOP ON STAGE, INC.; and CHRISTIAN
AUDIGIER, an individual
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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Defendants Christian Audigier, Inc., Nervous Tattoo, Inc., Shop on Stage, Inc. and Christian Audigier (collectively, the “Defendants”) operate successful and well-known apparel and accessories businesses, creating and marketing Christian Audigier brand-name products. The Christian Audigier brands are well-established in the industry and wildly popular with consumers. Indeed, due to their reputation and status as a fashion trend, consumers are motivated to purchase Defendants’ products in order to own apparel and accessories sporting the Christian Audigier label.

Christian Audigier brands are famous for their use of designs and images that are reminiscent of tattoo art. To create the Christian Audigier lines of clothing and accessories, Defendants have contracted with numerous artists and tattoo artists over the years to develop many hundreds of new images for use in their products. In 2005, Defendant Christian Audigier, Inc. commissioned artwork from Plaintiff Buckley Crispin (“Plaintiff” or “Mr. Crispin”) for this same purpose. Defendants paid Plaintiff a price that all parties agreed upon for his artwork and the rights to it so that Defendants could reproduce that artwork on clothing and accessories. Having seen Defendants’ success, Plaintiff filed this suit in an attempt to squeeze more money out of Defendants by inventing and ascribing new terms to the parties’ original agreement that never existed and to which Defendants never agreed.

In support of this effort and in pursuit of this lawsuit, Plaintiff has only recently seen fit to file an application with the Copyright Office to register the artwork, the rights to which he sold to Defendants more than 4 years ago. As Plaintiff has admitted, these applications are still pending with the Copyright Office, and the Copyright Office has not yet registered Plaintiff’s copyrights. Because the registration status is not yet settled on Plaintiff’s pending applications, this Court does not have subject matter jurisdiction over Plaintiff’s copyright

1 infringement claim. Because that claim is Plaintiff's sole federal law claim and
2 because Plaintiff has pled no other basis for jurisdiction here, this Court should
3 dismiss this action for lack of subject matter jurisdiction.

4 Plaintiff's Complaint should also be dismissed for insufficient process and
5 insufficient service, attributable to Plaintiff's defective summons form, failure to
6 direct the summons to each Defendant being served, and failure to properly effect
7 personal or substitute service on Mr. Audigier.

8 Additionally, this Court should dismiss Plaintiff's copyright infringement
9 and breach of the implied covenant of good faith and fair dealing claims for failure
10 to state a claim upon which relief can be granted. First, Plaintiff's copyright
11 infringement claim should be dismissed because Plaintiff failed to allege (1) facts to
12 identify the original works that are the subject of the claim, (2) copyright
13 registration of these original works, and (3) how and when Defendants infringed
14 Plaintiff's copyrights. Finally, this Court should dismiss Plaintiff's claim for
15 breach of the implied covenant of good faith and fair dealing because no special
16 relationship exists between the parties as required for tortious breach of the implied
17 covenant, and there is no separate cause of action under California law for non-
18 tortious breach of the implied covenant, which is duplicative of Plaintiff's breach of
19 contract claim.

20 **II. STATEMENT OF FACTS**

21 **A. Plaintiff Granted Mr. Audigier and Christian Audigier, Inc. a** 22 **License to Use His Artwork**

23 According to Plaintiff's complaint, between November 2005 and January
24 2006, Mr. Crispin granted an oral license to Christian Audigier, Inc. and Mr.
25 Christian Audigier, to use certain pieces of Plaintiff's artwork in the Christian
26 Audigier apparel and accessories lines. *See* Compl., at p. 2. Plaintiff recognizes
27 that Defendants paid Plaintiff for his artwork. *See id.*
28

B. Plaintiff Failed to Register His Artwork With the Copyright Office Prior to Filing His Complaint.

Despite selling his Artwork to Defendants in late 2005/early 2006, Plaintiff did not file an application to register these works with the United States Copyright Office until December 28, 2009—one day before Plaintiff filed his Complaint. Bowse Decl. ¶ 3, Ex. A.¹ Plaintiff does not allege that he has completed registration of his copyrights with the Copyright Office, but only that he has *filed an application*. Compl. ¶ 15. As Plaintiff has admitted, by filing his Report on the Filing or Determination of an Action or Appeal Regarding a Copyright with this Court, the applications for copyright registration are still pending with the Copyright Office. *See* Report on the Filing or Determination of an Action or Appeal Regarding a Copyright, Docket No. 4, filed on December 29, 2009 (hereinafter, “Filing Report”). The Copyright Office has neither registered, nor refused to register, Plaintiff’s copyrights. *See id.*

C. Plaintiff’s Service of Process on Defendants Was Defective and Improper.

Plaintiff attempted to serve some Defendants by delivering three blank copies of the summons and the Complaint to the business office of Nervous Tattoo at 8680 Hayden Place, Culver City, CA 90232, on January 6, 2009. Landver Decl. ¶ 2. The summons did not identify the Defendants being served. *See* Landver Decl. ¶ 3, Ex. A, Summons. Defendants Christian Audigier, Inc., Nervous Tattoo, Inc. and Shop on Stage, Inc. presume these summons were intended for them.

Plaintiff attempted to serve Mr. Audigier at his residence, but Mr. Audigier was not home. Barbieri Decl. ¶ 4. Plaintiff left a copy of the summons form and complaint at Mr. Audigier’s residence with Mr. Walter Barbieri, who happened to be present at Mr. Audigier’s residence. *Id.* ¶ 2. Mr. Barbieri does not reside at Mr.

¹ Defendants have separately requested that the Court take judicial notice of Exhibit A to the Bowse Declaration. *See* Request for Judicial Notice in Support of Defendants’ Motion To Dismiss Complaint.

1 Audigier's home. *Id.* The summons form that was delivered to Mr. Audigier's
 2 residence did not list Mr. Audigier's name as the Defendant being served, as the
 3 form was left blank. *Id.*, Ex. A, Summons Form.

4 **III. STANDARD OF REVIEW**

5 **A. Standard of Review Under Rule 12(b)(1)**

6 Federal Rule of Civil Procedure 12(b)(1) requires a court to dismiss a claim
 7 if the court lacks subject matter jurisdiction over it. *Loree Rodkin Management*
 8 *Corp. v. Ross-Simons, Inc.*, 315 F. Supp. 2d 1053, 1054 (C.D. Cal. 2004). The
 9 plaintiff has the burden to establish that subject matter jurisdiction is proper.
 10 *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994). This burden, at the
 11 pleading stage, must be met by pleading facts that establish a basis for the court to
 12 assert subject matter jurisdiction over the action. *McNutt v. General Motors*
 13 *Acceptance Corp.*, 298 U.S. 178, 189 (1936); Fed.R.Civ.P. 8(a)(1). Here, the only
 14 source of subject matter jurisdiction is Plaintiff's claim under the Copyright Act,
 15 which provides in pertinent part: "no action for infringement of the copyright in
 16 any United States work shall be instituted until registration of the copyright claim
 17 has been made in accordance with this title." 17 U.S.C. § 411(a).

18 When a party makes a factual attack on the district court's subject matter
 19 jurisdiction under Rule 12(b)(1), the court "need not presume the truthfulness of the
 20 plaintiffs' allegations." *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000). "Unlike
 21 a Rule 12(b)(6) motion, in a Rule 12(b)(1) motion, the district court is not confined
 22 by the facts contained in the four corners of the complaint—it may consider facts
 23 and need not assume the truthfulness of the complaint." *Americopters, LLC v.*
 24 *FAA*, 441 F.3d 726, 732 n. 4 (9th Cir. 2006). In support of a motion to dismiss
 25 under Rule 12(b)(1), the moving party may submit "affidavits or any other evidence
 26 properly before the court." *St. Clair v. City of Chico*, 880 F.2d 199, 201 (9th Cir.
 27 1989) (citations omitted).

1 **B. Standard of Review Under Rule 12(b)(6)**

2 Rule 12(b)(6) permits dismissal of a claim that lacks a cognizable legal
3 theory or if there are insufficient facts alleged to support the plaintiff's theory. *Bell*
4 *Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *Balistreri v. Pacific Police*
5 *Dept.* 901 F.2d 696, 699 (9th Cir. 1990). While Rule 8(a) of the Federal Rules of
6 Civil Procedure requires only a "short and plain statement of the claim," the court is
7 not obligated to accept as true legal conclusion couched as factual allegation. *Bell*
8 *Atlantic Corp.*, 550 U.S. at 555. Mere recitation of the elements of the alleged
9 violation are conclusory and not entitled to a presumption of truth. *Ashcroft v.*
10 *Iqbal*, 129 S.Ct. 1937, 1951 (2009).

11 **C. Standard of Review Under Rule 12(b)(4) and (5)**

12 Both Rule 12(b)(4) and Rule 12(b)(5) of the Federal Rules of Civil Procedure
13 allow a motion to dismiss for insufficiency of process. *Cranford v. U.S.*, 359 F.
14 Supp. 2d 981, 984 (E.D. Cal. 2005). Where the validity of service is contested, the
15 burden is on the party claiming that service was properly effected to establish
16 validity of service. *Grand Entertainment Group, Ltd. v. Star Media Sales, Inc.*, 988
17 F.2d 476, 488 (3d Cir. 1993). The court may weigh and determine disputed issues
18 of fact on a Rule 12(b)(5) motion. *Cranford*, 359 F. Supp. 2d at 984. Where
19 service of process is insufficient, the court has broad discretion to dismiss the action
20 or to retain the case but quash the service that has been made on defendant.
21 *Montalbano v. Easco Hand Tools, Inc.*, 766 F.2d 737, 740 (2d Cir. 1985).

22 **IV. PLAINTIFF'S COPYRIGHT INFRINGEMENT CLAIM FAILS TO**
23 **CONFER SUBJECT MATTER JURISDICTION AND FAILS TO**
24 **STATE A CLAIM.**

25 Plaintiff has not and can not allege facts that are necessary to confer federal
26 question jurisdiction on this Court and to state a claim for copyright infringement.
27 To plead a cognizable copyright infringement claim, Plaintiff's complaint must
28 contain allegations identifying: 1) which specific original works are the subject of

1 the claim; 2) that plaintiff owns the copyrights in issue; 3) that the works in issue
 2 have been registered; and, (4) by what acts and during what time defendants have
 3 infringed the copyright. *Gee v. CBS, Inc.*, 471 F. Supp. 600, 643 (E.D. Pa. 1979),
 4 *aff'd*, 612 F.2d 572 (3rd Cir. 1979); *Kelly v. L.L. Cool J.*, 145 F.R.D. 32, 36 (S.D.
 5 N.Y. 1992), *aff'd*, 23 F.3d 398 (2d Cir. 1994). Furthermore, not only must Plaintiff
 6 allege that his works have been registered to state a cognizable claim, the works
 7 must be registered to confer subject matter jurisdiction on this Court. *See, e.g., In*
 8 *re Literary Works in Electronic Databases Copyright Litigation*, 509 F.3d 116, 122
 9 (2d Cir. 2007)

10 Here, Plaintiff does not and cannot allege that his artwork has been registered
 11 by the Copyright Office. Plaintiff does not identify which pieces of his original
 12 artwork are the subject of his claim. And, Plaintiff's allegations do not identify
 13 how and when each Defendant infringed his copyright. With even just one of these
 14 deficiencies, Plaintiff's claim must fail.

15 **A. Plaintiff's Copyrights Are Not Registered with the Copyright**
 16 **Office.**

17 Plaintiff fails to allege that his copyrights are registered with the Copyright
 18 Office and instead alleges only that he has *filed an application*. Compl. ¶ 15.
 19 Filing an application is not enough. Actual copyright registration is a jurisdictional
 20 prerequisite for a copyright infringement action. *Kema, Inc. v. Koperwhats*, __ F.
 21 Supp. 2d __, No. C-09-1587 MMC, 2009 WL 2957851, at *5-6 (N.D. Cal. Sept. 10,
 22 2009) (plaintiff's allegation that he had "applied for registration of his copyright"
 23 was insufficient to confer subject matter jurisdiction and survive a motion to
 24 dismiss). Unless the Copyright Office has actually registered (or refused to
 25 register) Plaintiff's copyrights, this Court lacks subject matter jurisdiction over
 26 Plaintiff's copyright infringement claims. *See* 17 U.S.C.A. § 411(a) (2010); *see*
 27 *also Morris v. Business Concepts, Inc.*, 259 F.3d 65, 72, 73 (2d Cir. 2001) (holding
 28 "that subject matter jurisdiction was lacking because the registration requirement of

1 section 411(a) was not satisfied” and affirming dismissal “for lack of subject matter
 2 jurisdiction”); *In re Literary Works in Electronic Databases Copyright Litigation*,
 3 509 F.3d 116, 122 (2d Cir. 2007) (“Section 411(a)’s registration requirement limits
 4 a district court’s subject matter jurisdiction to claims arising from registered
 5 copyrights only.”)²

6 Filing an application for registration with the Copyright Office is not enough
 7 to satisfy the registration requirement. Under the Copyright Act, “no civil action
 8 for infringement of the copyright in any United States work shall be instituted until
 9 preregistration or registration of the copyright claim has been made in accordance
 10 with [the Act].” 17 U.S.C. § 411(a). Because it is the Copyright Office and not
 11 Plaintiff who is vested with the authority to register a copyright, registration does
 12 not occur until the Copyright Office issues a registration certificate. *See Loree*
 13 *Rodkin Mgmt. Corp. v. Ross-Simons, Inc.*, 315 F. Supp. 2d 1053, 1055 (C.D. Cal.
 14 2004) (quoting *Ryan v. Carl Corp.*, No. C 97-3873 FMS, 1998 WL 320817, at *2
 15 (N.D. Cal. June 15, 1998)). Although the Ninth Circuit has not addressed the issue,
 16 numerous courts have held that a pending application for copyright registration is
 17 **NOT** enough to confer subject matter jurisdiction. *Kema*, 2009 WL 2957851 at * 5
 18 (citing *La Resolana Architects, PA v. Clay Realtors Angel Fire*, 416 F.3d 1195,

19
 20 ² *Accord La Resolana Architects, PA v. Clay Realtors Angel Fire*, 416 F.3d 1195,
 21 1200 (10th Cir. 2005) (“Section 411(a) is the jurisdictional lynchpin to copyright
 22 infringement actions[.]”); *Positive Black Talk Inc. v. Cash Money Records Inc.*, 394
 23 F.3d 357, 365 (5th Cir. 2004) (noting that section 411(a) “supplement[s]” the
 24 “broad underlying” jurisdictional grants in 28 U.S.C. §§ 1331, 1338 and acts as an
 25 additional “jurisdictional prerequisite”); *Xoom, Inc. v. Imageline, Inc.*, 323 F.3d
 26 279, 283 (4th Cir. 2003) (“Copyright registration is a jurisdictional prerequisite to
 27 bringing an action for infringement under the Copyright Act.”); *Murray Hill*
 28 *Publ’ns, Inc. v. ABC Commc’ns, Inc.*, 264 F.3d 622, 630 n. 1 (6th Cir. 2001)
 (noting that while copyright protection exists prior to registration, “[t]he
 registration requirement under section 411[a] is a jurisdictional prerequisite to the
 right of the holder to enforce the copyright in federal court”); *Brewer-Giorgio v.*
Producers Video, Inc., 216 F.3d 1281, 1285 (11th Cir. 2000) (“It is well settled in
 this Court that the registration requirement is a jurisdictional prerequisite to an
 infringement suit.” (internal quotation marks omitted and alterations incorporated));
Data Gen. Corp. v. Grumman Sys. Support Corp., 36 F.3d 1147, 1163 (1st Cir.
 1994) (describing registration under section 411(a) as a “jurisdictional
 requirement”).

1 1205 (10th Cir. 2005) (rejecting “the proposition that § 411 confers federal court
 2 jurisdiction for an infringement action upon mere submission of a copyright
 3 application to the Copyright Office”; holding “the statute requires more: actual
 4 registration by the Register of Copyrights”); *Loree Rodkin Mgmt. Corp.*, 315 F.
 5 Supp. 2d at 1056 (holding “a federal district court lacks subject matter jurisdiction
 6 over a copyright claim if the certificate of registration is yet to be issued”); *Brush*
 7 *Creek Media, Inc. v. Boujaklian*, No. C-02-3491 EDL, 2002 WL 1906620, at *4
 8 (N.D.Cal. Aug. 19, 2002) (holding “the plain language of the statute forecloses
 9 copyright suits while a copyright application is pending and before a certificate of
 10 registration issues (or is denied)”); *Ryan*, 1998 WL 320817, at *2 (holding “[a]
 11 close reading of the Act indicates that registration does not occur until after the
 12 Copyright Office issues a Certificate of Registration”); *Int’l Trade Mgmt., Inc. v.*
 13 *United States*, 553 F. Supp. 402, 403 (Cl.Ct. 1982) (Kozinski, C.J.) (holding
 14 language of § 411 “is clear” that suit for copyright infringement “is conditioned on
 15 obtaining (or being denied) a certificate of registration”; noting this requirement
 16 “does not appear to be an oversight or mistake on the part of Congress”)); *see also*
 17 *DO Denim, LLC v. Fried Denim, Inc.*, 634 F. Supp. 2d 403, 406 (S.D.N.Y. 2009)
 18 (“Plaintiff’s mere filings of the applications, fees and deposits . . . do not satisfy the
 19 jurisdictional prerequisites of Section 411(a)”).

20 Though some courts have held that filing an application is enough to confer
 21 copyright registration, these courts simply misread the statute and misapply the law.
 22 *See, e.g., Loree Rodkin Mgmt. Corp.*, 315 F. Supp. 2d at 1057 n. 6 (stating that “the
 23 district courts within California that have concluded [that filing an application is
 24 enough] have done so after only a brief and superficial analysis of the matter.”). A
 25 close reading of the Copyright Act shows that registration does not occur until after
 26 the Copyright Office issues a certificate of registration. *Id.* at 1055. In fact the Act
 27 states that the Register of Copyrights shall register a claim and issue a certificate
 28 “[w]hen, after examination, [she] determines that ... the material deposited

1 constitutes copyrightable subject matter and that the other legal and formal
 2 requirements of this title have been met.” *See Ryan*, 1998 WL 320817, at *2
 3 (quoting 17 U.S.C. § 410(a)). Because this section indicates that “the Copyright
 4 Office, not the applicant, registers a claim, and that examination is a prerequisite to
 5 registration,” the section makes clear that an application for registration does not
 6 satisfy section 411(a) requirement that the Copyright be registered before an action
 7 may be filed. *Loree Rodkin Mgmt. Corp.*, 315 F. Supp. 2d at 1055 (quoting *Ryan*,
 8 1998 WL 320817, at *2). Since “[s]ection 410(a) expressly requires the Register of
 9 Copyrights to both register a claim and issue a certificate after examining the
 10 deposited material and determining that it constitutes copyrightable subject matter. .
 11 . . . , the phrase ‘register a claim’ cannot possibly refer to the pre-examination receipt
 12 by the Copyright Office of the applicant’s fee, deposit, and application.” *Loree*
 13 *Rodkin Mgmt. Corp.*, 315 F. Supp. 2d at 1055

14 Far from alleging that his copyrights are registered with the Copyright
 15 Office, as required to both state a claim for copyright infringement **AND** confer
 16 subject matter jurisdiction on this Court, Plaintiff has admitted that his applications
 17 are still ***pending*** with the Copyright Office. *See* Filing Report.³ In Plaintiff’s
 18 Filing Report (submitted to the Copyright Office to give notice of this action and
 19 filed with the Court on December 29, 2009), Plaintiff does not list the copyright
 20 registration numbers for his artwork, and instead describes all of his copyright
 21 registration numbers as being “pending.” Plaintiff’s pending applications do not
 22 confer jurisdiction on this Court. *See, e.g., Kema*, 2009 WL 2957851 at * 5-6.
 23 Accordingly, this Court should dismiss Plaintiff’s copyright infringement claim for
 24

25 ³ “Unlike a Rule 12(b)(6) motion, in a Rule 12(b)(1) motion, the district court is not
 26 confined by the facts contained in the four corners of the complaint—it may
 27 consider facts and need not assume the truthfulness of the complaint.”
 28 *Americopters, LLC v. FAA*, 441 F.3d 726, 732 n. 4 (9th Cir. 2006). In support of a
 motion to dismiss under Rule 12(b)(1), the moving party may submit “affidavits or
 any other evidence properly before the court.” *St. Clair v. City of Chico*, 880 F.2d
 199, 201 (9th Cir. 1989) (citations omitted).

1 lack of subject matter jurisdiction and failure to state a claim upon which relief can
2 be granted.

3 Because these admissions by Plaintiff and the facts of which the Court may
4 take judicial notice contradict the existence of a valid copyright infringement claim,
5 Plaintiff cannot resolve the defects in his complaint by amendment. Accordingly,
6 this dismissal should be with prejudice and without leave to amend. *In re Silicon*
7 *Graphics, Inc. Securities Litigation*, 183 F.3d 970, 991 (9th Cir. 1999) (dismissal
8 without leave to amend appropriate where evidence shows plaintiff cannot plead
9 facts to resolve deficiencies in claim).

10 **B. Plaintiff Fails to Identify What “Artwork” Is the Subject of His**
11 **Claim.**

12 Plaintiff’s copyright cause of action also fails to state a claim upon which
13 relief can be granted because it does not identify what artwork is the subject of
14 Plaintiff’s claim. Plaintiff’s descriptions of the original works that he asserts are
15 the subject of this action are limited to non-descriptive phrases such as “certain of
16 his works of art,” “accepted work,” “his designs” and “fifteen (15) of his original
17 works of art.” *See* Compl., at p. 2 and ¶¶ 15, 34. Plaintiff further uses the defined
18 term “Artwork” to describe the works at issue throughout the complaint. And,
19 despite the fact that Plaintiff defines the term differently in two separate sections of
20 the brief, neither definition comports with the requirement that Plaintiff plead
21 “which specific works are the subject of the claim.” *See* Compl., at p. 2 and ¶ 15.
22 Rule 8 requires at a minimum that plaintiffs identify the copyrighted works at issue.
23 *Gee*, 471 F. Supp. at 644; *Jetform Corp. v. Unisys Corp.*, 11 F. Supp. 2d 788, 790
24 (E.D. Va. 1998).

25 Plaintiff has not included one descriptive fact about the fifteen pieces of
26 artwork in question that could serve to identify what copyright works are the
27 subject matter of this action. Plaintiff instead minimally defines “Artwork” in two
28 ways, neither of which provides any information about the actual artwork. First,

Plaintiff states: “Audigier and CAI were to pay a sum certain for the right to reproduce each accepted work (‘Artwork’) on street-wear apparel . . .” Compl., at p. 2. A couple of pages later, Plaintiff redefines the term: “. . . Plaintiff licensed approximately fifteen (15) of his original works of art to Defendants Audigier and CAI. Plaintiff has filed to register each of these works (hereinafter “Artwork”) with the United States Copyright Office.” Compl. ¶ 15. Despite these two bites at the apple, Plaintiff fails to describe what particular works are the subject of this action. He has not alleged the subject matter of the artwork, the type of artwork, the medium in which the artwork is performed, the titles of the work, or any other detail which would identify the “copyright work” at issue here. Thus, since Plaintiff’s Complaint does not identify the original works in question, Plaintiff fails to state a cause of action for copyright infringement.

C. Plaintiff Does Not Specify How or When Defendants Infringed His Copyright.

Plaintiff’s copyright claim is further deficient because Plaintiff fails to allege the acts and timeframe of Defendants’ supposed infringement. Plaintiff’s claim for direct, contributory and vicarious copyright infringement is directed against each and every Defendant in this action. Plaintiff claims that seven separate companies (Christian Audigier, Inc., Nervous Tattoo, Inc., Shop on Stage, Inc. 3A Watch, LLC, Radiance Jewelry, Inc, Chromebones and Revolution Eyewear) and Christian Audigier, as an individual, *all* violated his copyrights. However, the complaint does not allege a single act by any of these Defendants that violated Plaintiff’s copyright. Nor does the complaint specify the time frame in which the infringing actions allegedly occurred.

A “properly plead [sic] copyright infringement claim must allege ... by what acts during what time the defendant infringed the copyright.” *Marvullo v. Gruner & Jahr*, 105 F. Supp. 2d 225, 230 (S.D.N.Y. 2000) (citing *Kelly v. L.L. Cool J.*, 145 F.R.D. 32, 36 (S.D.N.Y. 1992)). It must set out the “particular infringing acts ...

1 with some specificity. Broad, sweeping allegations of infringement do not comply
 2 with Rule 8.” *Marvullo*, 105 F. Supp. 2d at 230 (citing *Kelly*, 145 F.R.D. at 36 n. 3
 3 (citation omitted)). “A complaint which consists of conclusory allegations
 4 unsupported by factual assertions fails even the liberal standard of Rule 12(b)(6).”
 5 *De Jesus v. Sears, Roebuck & Co., Inc.*, 87 F.3d 65, 70 (2d Cir. 1996); *see also Bell*
 6 *Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (requiring “more than labels
 7 and conclusions, and a formulaic recitation of the elements of a cause of action” to
 8 survive a 12(b)(6) motion to dismiss).

9 From Plaintiff’s complaint, it is impossible to ferret out the scope, or indeed
 10 the source, of each Defendants’ liability, because Plaintiff’s broad, sweeping
 11 allegations lump all of the Defendants together. Plaintiff’s claim is for direct,
 12 vicarious and contributory infringement, but his complaint does not even begin to
 13 describe the role that any of the Defendants played in the alleged infringement.
 14 Therefore, it is impossible to tell from the complaint which theory of liability
 15 applies to each Defendant. Furthermore, Plaintiff does not provide any underlying
 16 factual basis to support his broad, sweeping allegations of infringement. Plaintiff
 17 relies on the following conclusory allegations to describe the alleged infringement
 18 in this action:

- 19 • “Defendants, and each of them, breached the Agreement in such a
 20 substantial and material way that Plaintiff, the grantor of rights,
 21 recaptured any rights granted so that any use of the work by the
 22 grantee was without authority and thus infringing.” Compl. ¶ 36.
- 23 • “Similarly, the scope of License was exceeded by Defendants, and
 24 each, and copyrights owned by Plaintiff were infringement [sic.] as a
 25 result.” Compl. ¶ 36.
- 26 • “Plaintiff is informed and believes and thereon alleges that
 27 Defendants, and each of them infringed Plaintiff’s copyrights by
 28 incorporating his original works of art into products without denoting

on said product that he original artworks were authored by Crispin. These products were advertised and went to market without a clearly visible Crispin Seal, a material violation of the License.” Compl. ¶ 37.

- “Despite violating the Agreement, and doing so knowingly and willfully, Defendants, and each of them, manufactured, imported, purchased, sold, advertised and distributed product bearing those of Crispin’s works of art in which they had no rights. The above acts constituted massive infringement of Crispin’s rights in his original artworks.” Compl. ¶ 38.
- “Defendants, and each of them, exceeded the scope of the License, and exploited the artwork licensed under the License in ways not contemplated by the License, including without limitation sub-licensing said works. The acts described herein breached the License, and this unlawful use of the artwork licensed by the License constitutes infringement.” Compl. ¶ 41.

The basic gist of each of Plaintiff’s allegations is that Defendants, “and each of them,” exceeded the scope of a license to use Plaintiff’s artwork. However, allegations that a defendant has used copyrighted material beyond the scope of a limited license, without any factual support, merely state a legal conclusion and are insufficient to withstand a motion to dismiss. *Marvullo*, 105 F. Supp. 2d at 228. In *Marvullo*, plaintiff attempted to plead copyright infringement by alleging that a photograph “was published by the Defendants beyond the scope and authority of the limited license.” *Id.* The Court held that “plaintiff’s unadorned allegation in paragraph nine that defendants have published the McNeely photograph ‘beyond the scope ... of the limited license,’ absent any factual support, merely states a legal conclusion insufficient to withstand a motion to dismiss.” *Id.*

Here, Plaintiff’s allegations are conclusory at best and are similarly “unadorned” by the requisite factual support to provide any meaningful insight into

1 what each Defendant purportedly did to infringe Plaintiff's copyrights, much less
 2 when the allegedly infringing acts took place. For example, Plaintiff alleges that
 3 "Defendants manufactured, imported, purchased, sold, advertised and distributed
 4 product bearing those of Crispin's works of art in which they had no rights," but he
 5 provides no factual basis for this conclusory allegation, such as which Defendant
 6 manufactured / imported / purchased / sold / advertised / distributed which product,
 7 bearing which copyrighted work, and when. Thus, due to Plaintiff's complete
 8 failure to describe any Defendant's purportedly infringing acts and the timeframe in
 9 which they took place, Plaintiff fails to state a cause of action for copyright
 10 infringement, and this Court should dismiss Plaintiff's copyright infringement
 11 claim.

12 Furthermore, since Plaintiff's copyright infringement claim is the only claim
 13 arising under federal law, and Plaintiff alleges no basis for jurisdiction other than
 14 federal question jurisdiction, this Court should dismiss Plaintiff's entire Complaint
 15 for lack of subject matter jurisdiction.

16 **V. PLAINTIFF FAILS TO STATE A CLAIM FOR BREACH OF THE**
 17 **IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING.**

18 Plaintiff's third cause of action for breach of the implied covenant of good
 19 faith and fair dealing also fails. It is unclear from Plaintiff's Complaint whether he
 20 intends to allege a claim for tortious breach of the implied covenant, or whether his
 21 claim merely sounds in contract law. Either way, this cause of action should be
 22 dismissed for failure to state a claim because (1) Plaintiff and Defendants did not
 23 have a special, fiduciary relationship, which is required to state a claim for tortious
 24 breach of the implied covenant, or (2) there is no distinct cause of action for a non-
 25 tortious breach of the implied covenant under California law, meaning that
 26 Plaintiff's claim is superfluous to its breach of contract claim.

27 *First*, there is no special relationship between Plaintiff and any of the
 28 Defendants that would support a claim for tortious breach of the implied covenant

1 of good faith and fair dealing. Tortious breach of the implied covenant claims have
 2 generally been limited to insurance and employment context, and virtually no
 3 relationships have been found to justify a tort recovery outside of this context. *See*
 4 *e.g.*, *Premier Wine & Spirits v. E. & J. Gallo Winery*, 846 F.2d 537, 540 (9th Cir.
 5 1988) (California law recognizing tortious breach of covenant of good faith and fair
 6 dealing applies only in employment or insurance cases.) This is because “no cause
 7 of action for the tortious breach of the implied covenant of good faith and fair
 8 dealing can arise unless the parties are in a ‘special relationship’ with ‘fiduciary
 9 characteristics.’” *Pension Trust Fund for Operating Engineers v. Federal Ins. Co.*,
 10 307 F.3d 944, 955 (9th Cir. 2002) (citing *Mitsui Mfrs. Bank v. Superior Court*, 212
 11 Cal. App. 3d 726, 730, 260 (1989)). “Thus, the implied covenant tort is not
 12 available to parties of an ordinary commercial transaction where the parties deal at
 13 arms’ length.” *Id.*

14 Plaintiff’s complaint describes a run-of-the-mill, arms-length, commercial
 15 transaction in which Defendants paid Plaintiff a fee for artwork and the right to use
 16 that artwork in connection with apparel and accessory products. Nothing about the
 17 transaction described by Plaintiff would give rise to fiduciary obligations of the
 18 special relationship necessary to turn a breach of contract claim into a tort claim.
 19 *Premier Wine & Spirits*, 846 F.2d at 540 (contract must be “characterized by
 20 elements of public interest, adhesion, and fiduciary responsibility” for tort claim to
 21 exist). Thus, Plaintiff’s cannot state a claim for tortious breach of the implied
 22 covenant.

23 Second, Plaintiff cannot state a claim for the non-tortious breach of the
 24 implied covenant, since no separate cause of action exists under California law.
 25 *See, e.g.*, *Careau & Co. v. Security Pacific Business Credit, Inc.*, 222 Cal.App.3d
 26 1371, 1400-01 (1990). Where no special relationship exists, breach of the implied
 27 covenant is nothing more than a duplicative claim for contract damages. *Id.*
 28 Conceptually, breach of the implied covenant **cannot exist** outside the context of a

1 breach of contract claim: “[W]here breach of an actual term is alleged, a separate
 2 implied covenant claim, based on the same breach, is superfluous. On the other
 3 hand, where an implied covenant claim alleges a breach of obligations beyond the
 4 agreement’s actual terms, it is invalid.” *Guz v. Bechtel National, Inc.*, 24 Cal.4th
 5 317, 327 (2000).

6 Since Plaintiff’s cause of action for breach of the implied covenant cannot
 7 state a claim for tort recovery, and does not exist as a separate cause of action
 8 outside of a breach of contract claim, Plaintiff’s third claim for relief should be
 9 dismissed with prejudice.

10 **VI. PLAINTIFF’S COMPLAINT SHOULD BE DISMISSED FOR**
 11 **DEFECTIVE SERVICE AND PROCESS.**

12 Plaintiff has made numerous errors in his attempts to effect service of process
 13 on Defendants Christian Audigier, Inc., Nervous Tattoo, Inc., Shop on Stage, Inc.
 14 and Mr. Audigier. Plaintiff’s Complaint should be dismissed under Rule 12(b)(4)
 15 for insufficient process because Plaintiff’s delivery of a blank summons rendered
 16 service defective. Plaintiff’s Complaint against Mr. Audigier should also be
 17 dismissed under Rule 12(b)(5) for insufficient service since Plaintiff has not
 18 properly served Mr. Audigier personally or through substitute service.

19 **A. Plaintiff’s Attempted Service With a Defective Summons Was**
 20 **Insufficient Process.**

21 Plaintiff failed to comply with the rules for preparing and serving a proper
 22 summons form under Federal Rules of Civil Procedure Rules 4(a). Specifically,
 23 Plaintiff’s summons were defective because they were not "directed to the
 24 Defendants" who were being served. *See* Fed. R. Civ. P. 4(a)(1)(B).

25 Under the Federal Rules of Civil Procedure, a summons must include the
 26 names of the parties, among other things, and must be directed to the defendant
 27 being sued. *See* Fed. R. Civ. P. 4(a)(1) (A), (B); *Bowman v. Sandofi-Aventis U.S.*,
 28 2009 WL 5083431, 1 (W.D. Tex. 2009). Here the summons used by Plaintiff

1 includes the names of the parties being sued on the caption. However, the
 2 summons is not directed at *ANY* Defendant, as this line has been left blank on the
 3 form. Three copies of the summons and complaint were delivered to 8680 Hayden
 4 Place, Culver City, CA 90232, on January 6, 2009. But all were identical and none
 5 of them specified the Defendant to whom they were directed. Landver Decl. ¶ 3,
 6 Ex. A. However, with over eight named Defendants in this case, it is unclear which
 7 Defendants Plaintiff attempted to serve at that time.

8 Plaintiff also served a copy of the summons and complaint at Christian
 9 Audigier's residence on January 12, 2010, but again failed to direct the summons to
 10 Mr. Audigier or any other Defendant. *See Barbieri Decl. ¶ 3, Ex. A, Summons*
 11 *Form*. Like the summons form served at 8680 Hayden Place, the summons form
 12 delivered to Mr. Audigier's residence also contained a blank line where the name of
 13 the Defendant being served should have been stated. *See id.* Though, it is likely
 14 that this summons was indeed directed to Mr. Audigier, Plaintiff was still required
 15 to conform to Rule 4(a)(1)(B) to effect proper service.

16 **B. Plaintiff Did Not Properly Serve Mr. Audigier Under the Rules for**
 17 **Substitute Service.**

18 Plaintiff attempted to serve Mr. Audigier at his residence on January 12,
 19 2010. Rather than serving Mr. Audigier personally, Plaintiff delivered a copy of
 20 the summons and complaint to Walter Barbieri, who was merely visiting the home
 21 and does not reside there. Barbieri Decl., ¶ 2. That does not constitute valid
 22 service.

23 “All means other than personal delivery to the defendant are considered
 24 substituted service, and personal service must have been diligently attempted before
 25 substituted service may be performed.” *Bonita Packing Co. v. O’Sullivan*, 165
 26 F.R.D. 610, 613 (C.D.Cal. 1995). “Ordinarily, ... two or three attempts at personal
 27 service at a proper place should fully satisfy the requirement of reasonable
 28 diligence and allow substituted service to be made.” *Id.* (citing *Bein v. Brechtel-*

1 *Jochim Group, Inc.*, 6 Cal.App.4th 1387, 1390 (1992) (internal citations omitted)).
 2 Here, there is no indication that Plaintiff attempted with reasonable diligence to
 3 serve Mr. Audigier personally before leaving a copy of the summons and complaint
 4 with Mr. Barbieri at Mr. Audigier's residence.

5 Furthermore, Plaintiff's substitute service on Mr. Barbieri was improper
 6 under both the Federal Rules and California law. To properly serve Mr. Audigier
 7 through substitute service at his residence under Rule 4(e)(2), Plaintiff was required
 8 to leave the summons with someone who *resides at* Mr. Audigier's home. *See e.g.*,
 9 *DeFazio v. Wright*, 229 F. Supp. 111, 113 (D.N.J. 1964) (delivery of process to
 10 husband not valid service upon wife and daughter who were not living with him at
 11 the time); *Franklin America, Inc. v. Franklin Cast Products, Inc.*, 94 FRD 645, 647
 12 (E.D. Mi. 1982) (delivery to part-time housekeeper who did not reside in
 13 defendant's home not valid service on defendant). Mr. Barbieri was a mere visitor
 14 at Mr. Audigier's home and does not reside there. Accordingly, even if Plaintiff
 15 had a basis to perform substitute service, he did not satisfy any of the rules for
 16 substitute service.

17 Plaintiff also failed to properly service Mr. Audigier under California law.
 18 For substitute service to be proper under California Code of Civil Procedure section
 19 415.20(b), Plaintiff was first required to attempt personal service consistent with
 20 California Code of Civil Procedure § 416.90. Then Plaintiff was required to leave
 21 the Summons and Complaint with a "member of the household". *See* Cal. Civ. Pro.
 22 § 415.20(b). Plaintiff simply has not done what the law requires. Therefore,
 23 service is not deemed complete. Because Mr. Audigier has not been properly
 24 served under either the Federal Rules or California Law, this action against him
 25 should be dismissed pursuant to Rule 12(b)(5).

26 **VII. CONCLUSION**

27 For the foregoing reasons, this Court should dismiss Plaintiff's Complaint
 28 with prejudice. The Court lacks subject matter jurisdiction over this action because

1 Plaintiff's copyright claim, which is the only claim sounding in federal law, fails as
2 a matter of law. Furthermore, Plaintiff's Complaint should be dismissed for
3 insufficient process and insufficient service. Finally, this Court should dismiss
4 Plaintiff's copyright infringement and breach of the implied covenant of good faith
5 and fair dealing claims for failure to state a claim upon which relief can be granted.

6
7 Dated: January 26, 2010

BROWNE WOODS GEORGE LLP
Michael A. Bowse
Amanda Morgan

8
9 By: /s/ Michael A. Bowse
10 Michael A. Bowse
[Mbowse@bwgfirm.com](mailto:mbowse@bwgfirm.com)

11 Attorneys for Defendants CHRISTIAN
12 AUDIGIER, INC.; NERVOUS TATTOO, INC.;
13 SHOP ON STAGE, INC.; and CHRISTIAN
14 AUDIGIER, an individual
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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 2121 Avenue of the Stars, Suite 2400, Los Angeles, California 90067.

On January 26, 2010, I served the foregoing document described as:
NOTICE OF MOTION AND MOTION TO DISMISS COMPLAINT FOR (1) LACK OF SUBJECT MATTER JURISDICTION [FRCP 12(B)(1)]; (2) FAILURE TO STATE A CLAIM ON WHICH RELIEF CAN BE GRANTED [FRCP 12(B)(6)]; AND (3) INSUFFICIENT PROCESS AND SERVICE OF PROCESS [FRCP 12(B)(4) AND (5)] on the parties in this action by serving:

Stephen M. Doniger, Esq.
Scott A. Burroughs, Esq.
DONIGER / BURROUGHS APC
300 Corporate Pointe, Suite 355
Culver City, California 90230
Tel (310) 590-1820 -- Fax (310) 417-3538
Email: stephen@donigerlawfirm.com;
scott@donigerlawfirm.com

☐ **By Envelope** - by placing ☐ the original ☐ a true copy thereof enclosed in sealed envelopes addressed as above and delivering such envelopes:

☐ **By Mail:** As follows: I am "readily familiar" with this firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. postal service on that same day with postage thereon fully prepaid at Beverly Hills, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

☐ **By Personal Service:** I delivered such envelope by hand to the offices of the addressee(s).

☒ **By E-Mail Electronic Transmission:** Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission, I caused the documents to be sent to the person(s) at the e-mail address(es) so indicated above. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

Executed on January 26, 2010, at Los Angeles, California.

☒ **FEDERAL** I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

/s/ Kathy Hall
Kathy Hall